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Supreme Court of the United States

October Term, 1963

No. 609

CHARLES H. RUBY, as President of the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated association,

Petitioners,

against

AMERICAN AIRLINES, INC.,

Respondent,

and

NICHOLAS J. O'CONNELL, JR., individually and as Chairman of the Master Executive Council of the pilots in the service of AMERICAN AIRLINES, INC., and the Negotiating Committee of said pilots, consisting of RICHARD LYONS, ROBERT T. GUBA, JOSEPH GARVEY, PAUL ATKINS and NICHOLAS J. O'CONNELL, JR., ex officio,

Additional Respondents,

and

JOSEPH V. MANNING, as President of the AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, and AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Intervenors.

BRIEF OF ADDITIONAL RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
SUMMARY OF ARGUMENT	3
STATEMENT OF THE CASE	4
Introduction	4
The Petition Fails to Comply with the Court's Rules and Should Be Denied	4
A. Failure to File an Appropriate Record	4
B. The Form of the Petition is Defective	6
The Identity of the Parties	8
(1) American Airlines	8
(2) ALPA	8
(3) The American Pilot Group	9
The Master Executive Council	9
The Negotiating Committee	10
American Pilot Leaders	10
Allied Pilots Association	11
The Crew Complement Dispute	12
Negotiations Between the Pilots and the Company	13
Allied's Representation Petition	17
National Mediation Board Decision	18

PAGE

POINT I—Certiorari would be inappropriate since there has been a decision on the merits against the petitioner in the courts below 20

POINT II—The National Mediation Board has exclusive jurisdiction over the issues raised in this case 24

The Statute and Authorities Vest Exclusive Jurisdiction over Representation Questions in the National Mediation Board 26

The National Mediation Board's Decision in this Case 27

Controlling Authorities 28

Remedies are Available for All Violations of the Railway Labor Act 32

Injunction to Enforce Certification 33

Criminal Penalties Under the Railway Labor Act 34

Remedies Through the N. M. B. 35

Remedy Through Representation Proceedings 36

Federal Aviation Act Remedy 36

Remedies are Available but Must Not Conflict 37

The Authorities Cited by the Petitioner are Inapposite 37

The Norris-LaGuardia Act Bars Petitioner's Action 45

POINT III—The decisions of the courts below are consistent with all authority construing the Railway Labor Act 46

CONCLUSION 52

INDEX TO APPENDICES

		PAGE
A.	Norris-LaGuardia Act, 29 U. S. C. §104	53
	Norris-LaGuardia Act, 29 U. S. C. §113	53
	Railway Labor Act, 45 U. S. C. §152 Tenth	54
B.	Order of U. S. Court of Appeals for the District of Columbia, No. 18060, November 6, 1963	56
C.	Affidavit of Nicholas J. O'Connell, Jr., April 24, 1963	57

TABLE OF AUTHORITIES

Cases

Airline Stewards and Stewardesses Ass'n Int'l v. National Mediation Board, 294 F. 2d 910 (D. C. Cir. 1961), cert. denied, 369 U. S. 810 (1962) 30, 34, 35

Brotherhood of R. R. Trainmen v. Chicago River and Ind. R. Co., 353 U. S. 30, 77 S. Ct. 635 (1957) 38

California v. Taylor, 353 U. S. 533 (1957) 38, 39

Chicago R. I. & Pac. R. R. Co. v. Switchmen's Union, 292 F. 2d 61 (2d Cir. 1961) 46

Cleaver-Brooks Mfg. Corp. v. N. L. R. B., 264 F. 2d 637 (7th Cir.), cert. denied, 361 U. S. 817 (1954) 39

Decker v. Venezolana, 258 F. 2d 153 (D. C. Cir. 1958) 51

Division No. 14, O. R. T. v. Leighty, 298 F. 2d 17 (4th Cir.), cert. denied, 369 U. S. 885 (1962) 32

Flight Engineers Int'l Ass'n v. Eastern Airlines, 311 F. 2d 745 (2d Cir. 1963) 30

PAGE

Flight Engineers Int'l Ass'n, EAL Chapter v. Eastern Airlines, Inc., Docket 14009, Order No. E-19923 (adopted August 19, 1963), CCH Avi. L. Rep ¶21,399 37

Garment Workers v. N. L. R. B., 366 U. S. 731 (1961) 43, 44
Gen'l Committee of Bhd. of Locomotive Engrs. v. M. K. T. R. Co., 320 U. S. 323 (1943) 28, 29, 33
Glens Falls Indemnity Co. v. United States, 229 F. 2d 370 (9th Cir. 1955) 22

Holyoke Cinema Shops, Inc., 139 N. L. R. B. No. 106 (1962) 39

I. A. M. v. Northwest Airlines, 304 F. 2d 206 (8th Cir. 1962) 35

Morewood v. Enequist, 23 How. 491 (1859) 22

N. L. R. B. v. Indianapolis Newspapers, Inc., 210 F. 2d 501 (7th Cir. 1954) 39
N. L. R. B. v. Standard Steel Spring Co., 180 F. 2d 942 (6th Cir. 1950) 39
N. L. R. B. v. Swift & Co., 294 F. 2d 285 (3d Cir. 1961) 39
N. M. B. Case No. R-136 (1935) 28
N. M. B. Case No. R-385 (1938) 28
N. M. B. Case No. R-3470 (1962) 28
N. M. B. Case No. R-3619 (1963) 18

Order of Railway Conductors v. N. M. B., 141 F. 2d 366 (D. C. Cir. 1944) 51

Pick Mfg. Co. v. General Motors Corp., 299 U. S. 3 (1936) 21

PAGE

Radio Officers Union v. N. M. B., 181 F. 2d 801 (D. C. Cir. 1950) 51
Richmond, The, 103 U. S. 540 (1880) 22

Stewart-Warner Corp. v. N. L. R. B., 194 F. 2d 207 (4th Cir. 1952) 42
Surprenant Mfg. Co. v. Alpert, 318 F. 2d 396 (1st Cir. 1963) 42
Switchmen's Union v. N. M. B., 320 U. S. 297 (1943) 51

Texas & N. O. R. Co. v. Bhd. of Ry. and S. S. Clerks, 281 U. S. 548 (1930) 21
Typographic Union v. McCulloch, 54 LRRM 2276 (D. D. C. October 3, 1963 (not officially reported) 42

UNA Chapter, Flight Engineers Int'l Ass'n v. National Mediation Board, 294 F. 2d 905 (D. C. Cir. 1961), cert. denied 368 U. S. 956 (1962) 30

Virginian Ry. Co. v. System Federation No. 40, 300 U. S. 515 (1937), aff'g 11 F. Supp. 621 (E. D. Va. 1935) 33, 34

W. E. S. Chapter, Flight Engineers Int'l Ass'n v. N. M. B., 294 F. 2d 905 (D. C. Cir.), cert. denied 368 U. S. 958 (1962) 30

Statutes

Federal Aviation Act
49 U. S. C. §1371(k)(4) 36

Norris-LaGuardia Act
29 U. S. C. §104(b) 2, 45
29 U. S. C. §113(a)(3) 2
29 U. S. C. §113(c) 2, 45

PAGE

Railway Labor Act
45 U. S. C. §151 8
45 U. S. C. §151(a) 31
45 U. S. C. §152, Ninth 8, 26, 51
45 U. S. C. §152, Tenth 2, 3, 34
45 U. S. C. §155, First (b) 35

Rules and Regulations

Rules of U. S. Supreme Court
Rule 19 6
Rule 21(2) 4
Rule 21(3) 5
Rule 23(4) 7

Fed. Rules of Civ. Procedure, Rule 52 21

29 C. F. R. §1206(b) 36

National Labor Relations Board, Statement of Procedures §101.18 ..... 39 fn.

Other Authorities

H. Rep. No. 972, 74th Cong., 1st Sess.; 2 Leg. Hist. of NLRA (1935) 31

28th Annual Report, National Mediation Board (1962) ..... 17 fn.

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Intervenors.

BRIEF OF ADDITIONAL RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The additional respondents in the above-entitled action hereby submit this brief in opposition to the petition of the Air Line Pilots Association for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

QUESTIONS PRESENTED

I. Is a petition for certiorari appropriate where it is based upon contentions contrary to the findings of two courts below and where an acceptance of the petitioner's contentions concerning jurisdiction would result in a reaffirmation of the decisions on the merits in favor of the respondents by the courts below?

II. Does a Federal court have jurisdiction to require a carrier governed by the Railway Labor Act to bargain with a union which claims it is the bargaining representative of certain employees and not another union which has been certified by the National Mediation Board, or is the determination of this question within the exclusive jurisdiction of the National Mediation Board?

III. Is the jurisdiction of the Federal court expanded to include the determination of representation questions under the Railway Labor Act where there have been allegations of carrier interference but the National Mediation Board has determined that such allegations are not based upon facts which will interfere with the free selection of a bargaining representative by the employees?

STATUTES INVOLVED

In addition to the Railway Labor Act, as set out in the Petition, Section 2 Tenth, 45 U. S. C. §152 Tenth of that Act and the Norris-LaGuardia Act. 29 U. S. C. §101 *et seq.* are also applicable, particularly the provisions at 29 U. S. C. §§104(b) and 113(a)(3), (c). These provisions are set forth in the Appendix hereto at pp. 53-55.

SUMMARY OF ARGUMENT

We will demonstrate in this brief that the grant of certiorari in this case would be wholly inappropriate; our argument addressed to the petitioner's failure to comply with the Rules of this Court is set out at pp. 4-7, *infra*.

I. The entire Petition is based upon a statement of facts which is totally at odds with th findings of the District Court and the decision and opinion of the Circuit Court. The petitioner's legal arguments are based upon its own unsubstantiated statements as to the facts of this case, and when viewed in light of the facts as found, they fall of their own weight.

II. Neither the facts of this case as stated in the record nor the decisions of the courts below support the petitioner's contention that there is no remedy for unlawful interference under the Railway Labor Act unless such conduct occurs during the actual holding of a representation election. The Railway Labor Act, 45 U. S. C. §152 Tenth, plainly provides criminal penalties for violations of the Act whenever they occur, and in the instant case the National Mediation Board conducted an investigation of petitioner's allegations concerning interference prior to even docketing the dispute as a representation proceeding.

III. There is no confusion as to the roles of the Federal courts and the National Mediation Board under the Railway Labor Act except that which the petitioner would create. The acceptance by this Court of the petitioner's novel thesis would result in vesting both the courts and the expert agency designated by Congress with the power to determine bargaining representatives in disputed situations under the

Railway Labor Act. The possibility of conflicting determinations would lead to chaos in an area where Congress has taken particular pains to assure certainty. The criminal provisions of the Railway Labor Act, and the ability of the courts to enforce the positive mandates of the Act where there is no question of representation, insure the availability of a remedy for any possible transgression.

IV. The District Court specifically found as a conclusion of fact, based upon a 3100-page transcript of testimony and hundreds of exhibits, that there had been no violations of the Railway Labor Act. The Court of Appeals concurred with these findings. A decision by this Court accepting the petitioner's jurisdictional theories would result in a remand and a further decision in favor of the respondents. Certiorari would be inappropriate in such a case where the decisions of the courts below rest on alternate grounds which will remain determinative regardless of the decision of this Court.

STATEMENT OF THE CASE

Introduction

The Petition Fails to Comply With the Court's Rules and Should Be Denied.

A. Failure to File an Appropriate Record

The procedure followed by the petitioner has been defective in several respects. The notice required under Rule 21(2) of this Court was not served upon respondents until some ten days after the Petition was filed and only then after there had been a demand by respondent. Petitioner

at first indicated it would rely on the appendices of the partie in the Court of Appeals *and* a transcript of the District hearings, but not the full record which included hundreds of exhibits and many evidentiary affidavits. It was discovered that a substantial portion of Additional Respondents' Appendix had not been forwarded to this Court; this was corrected after protest was made to the Clerk.

Respondents protested to the Clerk that the combination of materials set out in the petitioner's notice still did not comply with any of the alternatives set out in Rule 21(3). At first, the petitioner suggested it would delete all material from its petition which went beyond the appendices. The petitioner then undertook to supply the entire record and has given the respondents written assurances to this effect; this brief is written on the assumption that if necessary to its decision the Court will have before it the full record that was before the Court of Appeals. Indeed, we are aware of petitioner's efforts to supply such a record and have even loaned and given petitioner documents toward this end. The fact is, however, that these efforts *were begun tardily* and have not succeeded within the time prescribed by the Rules. These errors in the Petition, we submit, were directly attributable to the petitioner's haste to use the pendency of this Petition as an argument in another forum. (See pp. 49-50, *infra*.) This misuse of the Petition put a substantial and unwarranted burden of verification on respondents and required revisions in the proposed responses.

At this writing, the full period allowed by the Rules for filing a petition for certiorari has elapsed. Our understanding is that the Rules require that *both* the petition and the supporting submission be filed *at least* within the maximum

period permitted for the petition. Otherwise, there would be no limitation at all upon the time within which the record might be filed, and the petitioner could at his whim indefinitely postpone the conclusion of vexatious litigation.

The petitioner's misuse of the Petition and its failure to follow the prescribed rules and procedures are sufficient grounds for a denial of the writ.

B. The Form of the Petition is Defective.

The opinions of the District Court in this case comprise 63 pages of findings of fact and conclusions of law; the bulk of the material constitutes a recitation and explanation of the tangled relationships among the parties and represents the court's conclusions with respect to the facts governing this case. The decision of the Court of Appeals occupies some 18 pages, as printed in the Petitioner's Appendix, and also includes a review and summary of the facts; in its statement, the Court of Appeals deferred in part to "Judge Wyatt's comprehensive statement of the facts" (App. p. 2a).* Under these circumstances, we would assume that a petition for certiorari would require no more than a few paragraphs, or at most a few pages, which would provide a summary statement of the facts in this case and provide a basis for this Court's consideration of the "important question of Federal law which has not been, but should be, settled by this Court" (Rule 19, Rules of the United States Supreme Court).

Instead of the type of statement of facts we might properly expect, the petitioner has submitted 19 pages of mate-

* References to the Appendix to the Petition shall be cited as "App. p. —a".

rial which are totally unrelated to the findings made by either the District Court or the Court of Appeals. We are not speaking of minor divergencies. We are, instead, talking about a statement in the Petition which is totally unrelated to the courts' findings and which fabricates a state of facts which exists only in the petitioner's imagination as encouraged by the isolated and distorted portions of the record upon which it relies.

It is not the obligation of this Court to put the Statement of Facts in a petition for certiorari to the test of veracity or to match it against the facts which must control its decision until they are proven by the petitioner to be "clearly erroneous." We, therefore, submit that it would be proper for this Court to deny the petition for certiorari on the grounds that it fails to comply with the requirements of Rule 23(4) of this Court, which require the petitioner "to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration * * *".

In all events, we submit that the Petition's Statement of Facts should be wholly ignored. We invite the Court to rely instead upon the comprehensive findings and statements of the case in both court below. Under the circumstances, we will also take the responsibility of providing a statement of the case in which we will rely for the most part upon the actual findings and terminology of the courts below; in some instances, in order to correct the distorted picture given by the Petition, we will refer to additional facts in the record which are consonant with and provide a basis for the courts' findings.

The Identity of the Parties

(1) American Airlines is admittedly a common carrier by air, subject to the provisions of the Railway Labor Act, 45 U. S. C. A. §§151 *et seq.*

(2) "ALPA [the petitioner] is a national labor organization organized in 1931 and with Home Office in Chicago. For many years, going back at least to 1939, there have been written agreements between American and its pilots, represented by ALPA. These agreements have been signed by the President of ALPA 'for the air line pilots in the service of' American. * * * There has not been until recently any 'dispute' concerning representation which would bring about a certification by the National Mediation Board ('NMB'; 45 U. S. C. A. §152 Ninth); the January 21, 1959 agreement recites that ALPA has given 'satisfactory proof' of its representation but this recital is a carry-over from earlier years; no proof was in fact given or required and there is no evidence that ALPA was ever chosen as bargaining representative for the American pilots by any ballot or other formal procedure" (App. pp. 23-24a). ALPA has never been the certified representative of the pilots on American Airlines (App. p. 54a).

A number of other facts appear in the record which support a finding that ALPA, as distinguished from the local American pilot leadership, had lost the confidence and allegiance of American's pilots. For instance, some 1,091 pilots (approximately 65%) had, at the time of the hearings, declined to pay dues and other assessments to ALPA (Tr.* 2490). Under ALPA's Constitution, these pilots, plus another 152 who had resigned or had been expelled

* Refers to transcript of hearings before district court.

(Tr. 2490), were considered by ALPA to be members in bad standing and denied "all of the rights, privileges and benefits * * * of membership in the Association" (ALPA Const. Art. IX, §11(b), ALPA Apx.* 149).

When charges against the American pilot leadership were filed by ALPA within its internal structure, the spontaneous reaction of the pilots in the field was that some 800 signed petitions asking that they be made co-defendants. In addition, a unanimous resolution was passed by the MEC, the American pilot governing body, by which each Council Chairman asked that he be considered co-defendant to ALPA's charges (Tr. 2495). These charges led to the expulsion of the Negotiating Committee (Tr. 3065-66).

(3) The American Pilot Group

(a) *The Master Executive Council.* "For each air line, the fundamental unit [of representation] is the Local Council, one of which is established at each important base of the air line" (App. p. 24a). In the words of the ALPA Policy Manual (Add. Apx.** 16), "The Local Executive Councilmen are the elected representatives of the Local Council, and the LEC is the voice of the Local Council membership on the Local level."

The Master Executive Council is composed of the Chairmen of the Local Councils. According to the ALPA Policy Manual (Add. Apx. 20):

"The Master Executive Council is the highest governing body for the Association membership on an air line

* Refers to Petitioner's Appendix in Court of Appeals as filed in this court.

** Refers to Additional Respondent's Appendix in Court of Appeals as filed in this court.

and shall function as a coordinating council acting on problems of interest to, and implementing Association policy applicable to the Association membership on an air line. (*Reference: Constitution and By-Laws, Article IV, Section 6.*)"

The MEC was, at the time the controversy within ALPA began, the only representative body elected by the pilots of American Airlines alone.

(b) *The Negotiating Committee.* "For each air line there is also a Negotiating Committee, which under ALPA policy is selected or elected by its MEC" (App. p. 25a). ALPA's Policy Manual also requires that the Negotiating Committee "should include a member(s) of a former Negotiating Committee," and that subject to the ALPA Constitution "the Negotiating Committee shall have the authority to conclude an agreement * * *" (Add. Apx. 23).

> "The Committee with which the Company elected in January 1963 to deal was exactly the same Committee with which it had been dealing all along * * *" (App. p. 52a).

(c) *American Pilot Leaders.* Capt. Nicholas J. O'Connell, Jr. was the Chairman of the pilots MEC and also an ex officio member of the Negotiating Committee. He has been active in negotiations for many years, both in his role as MEC Chairman and as a member of various negotiating committees (Tr. 239-40).

The other named members of the Negotiating Committee include: Capt. Paul Atkins, until 1962 the Secretary of the International Association, a former MEC Chairman, and active participant in negotiations for many years (Tr.

2374-75); Capt. Robert T. Guba, Chairman of the Local Council for the New York area (Tr. 3069); Capt. Joseph Garvey, Chairman of the Chicago Local Council and participant on Association committees, including one considering the Association's crew complement policy (Tr. 2377, 3068); Capt. Richard Lyons, Chairman of the Negotiating Committee (Tr. 186).

(d) *Allied Pilots Association.* The first act leading towards the formation of the Allied Pilots Association occurred on March 21, 1963, by a resolution of the pilots' MEC which authorized its officers to take the necessary steps to form an organization completely independent of ALPA. Even this action by the MEC was conditioned upon the final attempt to be made by the American pilot leadership for a rapprochement with ALPA. This was attempted and failed. Consequently, the new organization, Allied, proceeded to obtain proof of support from the American pilot group. It did this by means of a mail solicitation of "Authorization-To-Act" cards (App. p. 8a). (The actual procedures followed by Allied are fully detailed in the Appendix to this brief at pp. 57-61.) At the time of the hearings in the District Court some 85% of the pilots had designated Allied as their representative. This figure and the signatures on the cards were later verified by the National Mediation Board (App. p. 70a).

On April 24, 1963, Allied filed a representation petition with the National Mediation Board asking that it be certified as the pilots' bargaining representative. Because of an extended investigation by the Board and litigation commenced by ALPA against the Board, an election was not held until November 7, 1963, after the Court of Appeals for

the District of Columbia had rejected two attempts by ALPA to delay still longer the election. (See Appendix B of this brief and Appendix C of American's brief.) In the balloting 1,280 pilots voted for Allied, while ALPA received 99[illegible]otes; Allied was certified as bargaining representative on November 13, 1963 (Appendix A to American's brief).

The Crew Complement Dispute

This litigation has its roots in the so-called "crew complement" dispute which has been vexing the airline industry for many years. The background of this controversy is set out at length by the District Court at App. p. 25a, *et seq.* Briefly, the dispute began with the desire of the airline industry to reduce the cockpit crew complement on jet aircraft from four to three. This provoked a controversy between the organizations representing flight engineers and ALPA as to whether a pilot or a flight engineer should occupy the third seat in such 3-man crews.

This dispute, in turn, led to the differences which finally separated American's pilots and their leadership from ALPA. "The situation in American was importantly and significantly affected by the desire (*known to the ALPA Home Office*) on the part of American pilots for a reduction in hours, an improved retirement plan, and other changes. President Sayen on *November 7, 1961* wrote the National Mediation Board that the crew complement problems were 'but minor issues on American Airlines' compared to the pilot proposals on retirement and working conditions" (App. p. 31a). (Emphasis added.)

On the other hand, ALPA national leadership, and particularly after the election of a new President, Charles Ruby, argued for the paramountcy of requiring a "C&I" Certificate, which would put the third crew member in the pilot category. This difference in viewpoint between the American leadership and Ruby appeared as early as July 22, 1962 at a meeting in Washington, D. C. "O'Connell, one of the chief pilot negotiators and now an additional defendant, there made it clear that his group was primarily interested in reduction of hours and other benefits and if it were necessary to save the Company money on flight engineer training in order to secure such benefits, his group would consider agreeing to a reduction in flight engineer training below that required for a 'C and I' as recommended by the Feinsinger Commission. While thus put on notice, Ruby did not agree and stated a contrary ALPA position. O'Connell had earlier the same day in an open meeting, with Chairman Edwards present, stated that the crew complement problem on American was 'inversely related to reduction in hours'" (App. pp. 36a-37a).

Negotiations Between the Pilots and the Company

The negotiations between the pilots and the company were of more than local interest. As a result, the Chairman of the National Mediation Board, Leverett Edwards, was appointed by the Secretary of Labor to attend and supervise these negotiations. As the District Court pointed out, either Edwards or a staff mediator in the employ of the National Mediation Board was at every negotiating session of any importance, including all those which ALPA has attacked (App. pp. 35a-36a, 50a).

Long before there was any thought by the pilots of leaving ALPA, the American pilot leadership had set the tone of the negotiations to come. Thus, as early as May of 1962, the American pilots suggested to the company "that they were not interested in having the Company spend its money to qualify flight engineers with a 'C and I' under the Feinsinger Commission formula; they wanted a reduction of hours and other benefits instead" (App. p. 35a).

A series of negotiation sessions "in Fort Worth (July 31-August 2) between the pilots and the Company, with Chairman Edwards present, were significant because the basis was there established for all subsequent negotiations.

"The pilots, through O'Connell, made a proposal during these meetings which * * * was that if the Company would grant them reduced hours and an improved retirement plan, they on their side would agree to a three man crew without insisting that the flight engineer have a 'C and I' (thus saving the Company expensive training), and would bring the engineers not only into such an agreement but also into a merger with Alpa so that the Feinsinger Commission recommendation of one union in the cockpit would be accomplished.

"This proposal came from the pilots, not the Company, and was often called 'O'Connell's iffy'; *in fact the proposal came from ALPA itself because the Negotiating Committee was at the time (and for a considerable period thereafter) functioning as an official Alpa bargaining committee* with an Alpa Home Office staff member in constant attendance. Since the proposal conflicted, however, with the strong position theretofore taken by the Alpa National organization, the Company raised the question in Fort Worth and later whether the pilots could secure an Alpa approving

signature. The pilots were apparently confident that the Alpa Home Office would go along and told the Company team that Alpa policy had been changed at its last convention and that they (especially Garvey) had a good deal to do with Alpa policy in this area. Moreover, Miller, a Regional Vice-President of Alpa, was a member of the pilots' Negotiating Committee and was at the Fort Worth and many other meetings; Harkenrider, the Alpa staff negotiator, was also there and at all other meetings until late November. The American pilots did not at this time contemplate any break away from Alpa" (App. pp. 37a-38a). (Emphasis added.)

After further negotiations between the pilots and the company and some discussions between the pilots and flight engineers, a series of joint pilot-flight engineer negotiations with the company ensued. These negotiations led to the so-called crew complement agreement of December 1, 1962, which substantially embodied the O'Connell "iffy".

ALPA, through its President Ruby, learned about the Fort Worth proposal no later than the middle of September (App. p. 45a). From September well into December, the discussions between Ruby, the various organs of ALPA, and the American pilots continued.

After a meeting attended by O'Connell, Ruby and Whitacre for the company, the negotiations were recessed until sometime in January over O'Connell's objections (App. p. 47a). After further events, including meetings between the American pilots and ALPA organs, Ruby notified the American Negotiating Committee that ALPA would not reimburse Committee members for their expenses and flight pay loss, as had been the practice in the past, unless the

negotiations were conducted with his "prior approval" (App. p. 49a). In the meantime, the American MEC had met and directed the Negotiating Committee to continue its negotiations in the same manner, despite the objections of the Home Office. O'Connell informed the company of these resolutions on January 11 and assured the company that any agreement reached by the American leadership would be ratified by 75% of American pilots; O'Connell repeated earlier requests that negotiations be continued. "Whitacre then on January 15 explained the situation to Chairman Edwards, who advised in substance that the Company had no choice but to resume negotiations with the American Committee, that it was the same committee as before *and that there was no other committee with which to negotiate*" (App. pp. 49a-50a). (Emphasis added.) Negotiations between the company and the Negotiating Committee were resumed under the supervision of the Chairman of the National Mediation Board on January 16, 1963 (App. p. 50a).

During this very period of January, 1963, an agreement respecting a lease of planes and personnel by American to British West Indian Airways was negotiated by the Committee and signed by Ruby (App. p. 53a). ALPA's subsequent attempts to interfere with the continued negotiations between the American pilot leadership and the company are catalogued in the District Court's opinion at App. pp. 55a-58a. These included appeals by the ALPA Home Office to the National Mediation Board, as well as to the company, to break off negotiations. Both the Board and the company, on the Board's advice, met with ALPA representatives and discussed their contentions but finally rejected them. Although ALPA passed resolutions and sent paid staff mem-

bers from Chicago to interrupt the negotiations "ALPA was unable to supply a substitute negotiating committee that accorded with past practice and its own Policy Manual" (App. p. 13a). At no time during the whole course of negotiations, and subsequently during the course of litigation, did ALPA put forward any group or committee which even purported to act at the direction of or by the selection of the American pilot group.

Allied's Representation Petition

Soon after its formation was authorized by the MEC, Allied quickly received authorization cards from approximately 76% of the pilots (later increased to more than 84%) and filed a petition for certification with the National Mediation Board (App. p. 8a).

ALPA promptly filed objections with the National Mediation Board to the conduct of any election or certification on the grounds of the pending action before Judge Wyatt and the allegations made therein. Before Allied even had an opportunity to respond to these charges, the Board had assigned a "C" docket number to Allied's petition (Seham affidavit, May 8, 1963, pp. 2-3). This action by the Board meant that the petition was being docketed *for investigation only*, and no determination had been made as to whether the Board would employ its certification machinery.* An investigation by the Board was then begun, which

* The differences between a "C" docket number and an "R" docket number are best explained by the Board itself in its recent Brief to the Court of Appeals for the District of Columbia, Civ. 1544-63, No. 18,060 (November, 1963, p. 16). The Board said there:

> "If there is no dispute as to the appropriateness of the case for resolution by an election, then after verification of the authorization cards by a mediator, the case will be docketed as a 'repre-

lasted a full month. (The full details of this investigation are set out in the affidavit of Thomas A. Tracy, Assistant Executive Secretary of the National Mediation Board, which is included in the Appendix to the Appellant's Brief to the Court of Appeals, pp. 155-64, and are summarized by the Court of Appeals at App. p. 15a.) It should be noted that the mediator was "directed to conduct a special and unusual investigation in respect to the allegations * * * of counsel for ALPA * * *."

National Mediation Board Decision

"After full consideration, the Board concluded that it had made an adequate investigation of the charges made by ALPA and that the investigation had disclosed no facts to indicate that a representation election by secret ballot cannot be held free of interference, assistance, influence or coercion by the carrier" (Tracy Affidavit ALPA Apx. p. 159). This determination led to a decision by the National Mediation Board dated May 24, 1963, that the petition should be "docketed as NMB Case No. *R*-3619" (Tracy affidavit ALPA Apx. 160).

ALPA, in effect, moved for reconsideration by the National Mediation Board, which was denied by decision dated June 5, 1963 (ALPA Apx. 160). By June 12, 1963, the Board's mediator had completed a further investigation of the validity of the authorization cards (certifying that Al-

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sentation dispute', assigned an 'R . . . .' No., and the dispute will be resolved by the employees through an election. However, if the parties bring to the attention of the Board special facts indicating that the application should not be docketed for processing as an ordinary representation dispute, a special investigation is ordered. During this special investigation the case will be assigned a special 'C . . . .' number under the completion of the investigation. See, 28th Annual Report, National Mediation Board (1962), p. 20."

lied held valid cards from more than 84% of the pilots), and on June 13, 1963 he was authorized to take the necessary steps to send ballots to pilots (App. p. 9a).

The Board was prepared to send the ballots to the pilots on the eligible list June 21, 1963, for return and counting in New York on July 16, 1963. However, on June 18, 1963, ALPA, utilizing the papers and affidavit it had filed before Judge Wyatt but introducing none of the opposing material, obtained an *ex parte* order in the Washington, D. C. District Court against the Board's election.

This restraining order was extended from time to time, the District Court in Washington indicating that due primarily to calendar conditions it would not move promptly to any full hearing on ALPA's action against the Board (Scham Affidavit, June 26, 1963, pp. 2-3). It was only after these events—namely, after Allied had secured written support from approximately 85% of the pilots; after it had attempted to proceed by a Board election; after its authorization cards had been verified by the Board; after ALPA had moved against the National Mediation Board in another forum without joining Allied and where Allied could not conveniently appear; and after ALPA had obtained what appeared to be indefinite stays of the scheduled Board election—that Allied demanded and received contractual recognition from American (see App. 9a-10a).

ALPA made successive motions in Washington for a deferment of the Board election, relying heavily on the fact that first the District Court and then the Court of Appeals decisions were pending in New York. Finally, on August 22, 1963, the Court of Appeals for the District of Columbia granted a further restraint against the National Mediation Board "in view of the pendency of the appeal

[in] * * * the Second Circuit" (Appendix B to American's brief). After the decision by the Court of Appeals for the Second Circuit, from which the instant appeal has been taken, the Court of Appeals for the District of Columbia on October 23, 1963 granted the National Mediation Board's motion to dissolve the injunction against the conduct of an election (Appendix C to American's Brief). The National Mediation Board, accordingly, mailed ballots to the pilots of American Airlines which were to be returned to the Board and counted by November 7, 1963. ALPA again moved in the Court of Appeals for the District of Columbia for an order restraining the tabulation of the ballots. Although ALPA submitted a lengthy brief in support of this motion, it was summarily denied by the Court of Appeals for the District of Columbia (Appendix B to this Brief). The ballots were tabulated on November 7, 1963, and they showed that the Allied Pilots Association had received some 92% of the votes cast; Allied was certified as bargaining representative by the NMB on November 13, 1963 (Appendix A to American's Brief).

POINT I

Certiorari would be inappropriate since there has been a decision on the merits against the petitioner in the courts below.

The courts below have ruled adversely on the merits of the petitioner's claims. Any suggestion to the contrary by the petitioner in flatly contradicted by its brief to the Court of Appeals, in which it said (p. 39):

"Since Judge Wyatt has made it amply clear that in his view, *plaintiffs' position* on the isssues raised by the complaint *is without merit, a remand of this matter is unnecessary*, in the event that this Court finds, contrary to the Court below, that there was no lack of jurisdiction over the subject matter.

"Appellants consequently seek a decree of this Court which (1) reverses the District Court on the issue of jurisdiction over the subject matter, (2) determines that the appellees have violated positive mandates of the Railway Labor Act, and (3) provides an effective remedy to deal with the initial and continuing effects of such violations." (Emphasis added.)

In view of the findings of the District Court, the Court of Appeals was bound by the strictures of Rule 52 of the Rules of Civil Procedure, which states in part that:

"'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

These findings have now been approved by the Court of Appeals as well. Under the "Two Court" Rule which has long been followed by this Court, the findings of the court below would similarly be entitled to binding effect unless they have been shown on the basis of the entire record to be clearly erroneous. *E.g., Texas & N. O. R. Co.* v. *Brotherhood of Ry. and S. S. Clerks*, 281 U. S. 548 (1930); *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U. S. 3 (1936). Under these circumstances, the burden is on the petitioner to show the manner in which the courts below were clearly erroneous, with every presumption in favor of those decisions; it is not sufficient that the petitioner succeed in mere-

ly creating a doubt by pointing to isolated bits of conflicting testimony. *The Richmond*, 103 U. S. 540, 542 (1880); *Morewood* v. *Enequist*, 23 How. 491, 495 (1859).

Although the burden on the petitioner in this Court must be even heavier than it was before the Court of Appeals, where it contended with only one adverse decision, we think the observation by the court in *Glens Falls Indemnity Co.* v. *United States*, 229 F. 2d 370, 373 (9th Cir. 1955), would be equally applicable here. There the court said:

> "In most instances the points urged either involve only questions of fact or are based on assertions of fact contrary to the findings of the trial court. It is not the function of this Court to retry cases on appeal. Findings of fact by the trial court are presumptively correct. F.R. Civ. P. Rule 52(a), 28 U. S. C. A. An appellant's mere challenge to a finding does not cast the onus of justifying it on this Court. The party seeking to overthrow findings has the burden of pointing out specifically wherein the findings are *clearly* erroneous. Appellant has not carried the burden * * * particularly in view of the exhaustive study and discussion of the facts contained in the trial court's written memorandum. *U. S.* v. *Foster*, 9 Cir. 1941, 123 F. 2d 32; *Anderson* v. *Federal Cartridge Corp.*, 8th Cir. 1946, 156 F. 2d 681; Vol. 2 Barron and Holtzoff, *Federal Practice and Procedure*, Sec. 1131, p. 831."

In addition to the hundreds of exhibits which were introduced, primarily by ALPA, the District Court presided over weeks and months of testimony, which resulted in more than 3,000 pages of written transcript. It was on the basis of this record, and its opportunity to judge the character and credibility of the witnesses appearing before it, that the District Court made such findings as the following:

"The Company had nothing to do with the creation of the dispute within ALPA, nor is there any evidence of any *preference* by the Company not to have ALPA. * * *

"The fact that the Company continued to deal with the Negotiating Committee was not in my view any violation of the Act, considering that the Company acted in *good faith*, reasonably, without any practical alternative, and without any antiunion *motivation*." [App. pp. 77a-78a]. [Emphasis added.]

These findings involve issues particularly susceptible to accurate determination by the trier of fact.

Reviewing the record and the District Court's comprehensive opinion, the Circuit Court made the following findings, among others [App. pp. 12a-13a]:

"American never conditioned its willingness to grant economic benefits upon the pilots' withdrawing from ALPA * * *. Rather than refusing to deal with the union's bargaining representative and negotiating with the employees directly, as the employer did in *Medo*, American dealt for months with the very group with which ALPA's Constitution and By-Laws and Policy Manual told it to deal; and when an impasse developed through ALPA's refusal to accept the results of the negotiation, a refusal wholly within its rights, ALPA was unable to supply a substitute negotiating committee that accorded with past practice and its own Policy Manual. American recognized Allied only when possessed of substantial evidence that Allied represented an *overwhelming* proportion of its pilots and when threatened with a strike if it refused recognition." [Emphasis added.]

As we will see, each of petitioner's arguments is predicated on a state of facts contrary to the findings we have just summarized. Nowhere in its petition and nowhere in its appeal below does the petitioner attempt to analyze the entire record and all of the evidence contained therein in order to show that these findings are clearly erroneous and against the overwhelming weight of the evidence. Indeed, it does not seem to us that petitioner even makes this argument, which is a necessary predicate to its case; instead, it has merely asserted its own version of the facts, which is wholly at variance with the decision and opinions of two courts below.

We, therefore, submit that the contentions raised by the petitioner are completely without merit because they are based on fictitious circumstances. In any event, the courts below have plainly indicated, as ALPA has acknowledged, that if the Federal courts have jurisdiction over the issues raised, the decision will be adverse to the petitioner. The grant of certiorari in such a case would be wholly inappropriate.

POINT II

The National Mediation Board has exclusive jurisdiction over the issues raised in this case.

The following passages are from the transcript in the proceeding before the District Court, March 27, 1963, at pp. 60, 61:

"Mr. Weiss (General Counsel for ALPA): But the fact remains that there is only one way under these

circumstances that you can ascertain if there is a genuine question as to who is the bargaining agent.

"The National Mediation Board is the only agency that has the function and the exclusive function of making such a determination; and the cases * * *

* * *

"The Court: Where do we find that?

"Mr. Weiss: In the Railway Labor Act, under Section 2 Ninth as I recall. Yes.

* * *

"Mr. Weiss: * * * However, the determination of bargaining representatives under any circumstances has been declared by the Supreme Court to be the exclusive function of the National Mediation Board under the Switchman Union [sic.] case and many other cases, and that is the only agency that can make such a determination."

This colloquy took place prior to the time that the American pilots were made parties. At that time, as the omitted discussion between the court and counsel indicates, the only party before the court which could seek a determination from the National Mediation Board was ALPA itself.

On April 25, 1963, ALPA's General Counsel made the following statement in the District Court:

"If the Mediation Board should certify any organization, then whether this Court then has this matter under consideration or has issued a decree, a preliminary injunction or whatever the result may be—if it is a continuing problem, the Court should dismiss it out of hand * * *" [Tr. p. 2250].

The Statute and Authorities Vest Exclusive Jurisdiction Over Representation Questions in the National Mediation Board.

ALPA wants only one thing from this action: It wants the Federal court to install it as the bargaining representative of American's pilots, notwithstanding any wishes of the men or any action by the National Mediation Board to the contrary.

The statute governing the manner in which representatives are certified under the Railway Labor Act is Section 2, Ninth, which states in pertinent part:

> "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier * * *"

The National Mediation Board's Decision in this Case

In this case the National Mediation Board undertook the responsibilities assigned to it by the Railway Labor Act and rendered the decision which the Act requires.

> "After full consideration, the Board concluded that it has made an adequate investigation of the charges made by ALPA and that the investigation had disclosed no facts to indicate that a representation election by secret ballot could not be held free of interference, assistance, influence or coercion by the Carrier." [Aff. of NMB Assistant Executive Secretary Thomas A. Tracy, ALPA Apx. p. 159.]

In the early portions of his affidavit, Mr. Tracy explains in detail the materials reviewed by the Board's investigator and by the members of the Board. Full opportunity was given to all the parties to submit all the material they chose, including any of the papers or evidence which had been submitted to the District Court in New York. Mr. Tracy observed that "each of the three members of the Board reviewed *personally* the material submitted * * *." Moreover, the Board "was completely familiar" with the negotiations which ALPA questioned "because a substantial part of them had been carried on in the presence of a representative of the Board." As the Court of Appeals observed:

> "ALPA has told us of no additional material facts it would have presented if the Board had given it a further opportunity; its complaint relates not so much to the adequacy of the information before the Board as to the Board's conclusion that no wrong had been done." [App. p. 15a].

In considering ALPA's theoretical argument, the basic fact must be borne in mind that the investigation we have just described took place before Allied's petition was even docketed as a representation matter. After Allied's petition on April 24, 1963, the National Mediation Board, as a result of ALPA's allegations, docketed the petition on its "C" calendar, which meant that it was being docketed for investigation only. (See *supra*, p. .) It was not until the conclusion of its investigation, a full month later, that the Board docketed the petition on its representation calendar and began the normal processing of this petition. It must be plain, therefore, that ALPA's contention that the Board will only undertake an investigation of alleged wrongdoing which occurs during the actual election procedures is patently wrong on the facts and history of this case.

As the petitioner admits [Pt. p. 41], the Board, in cases *where it has found wrongdoing*, has not deemed itself without power to take the appropriate remedial action. See N. M. B. Case No. R-136 (1935); N. M. B. Case No. R-385 (1938); N. M. B. Case No. R-3470 (1962).

Controlling Authorities

The landmark case establishing the Board's exclusive jurisdiction over issues of representation is *Gen'l Committee of Bhd. of Locomotive Engrs.* v. *M. K. T. R. Co.*, 320 U. S. 323 (1943). In that case the court pointed out (320 U. S. 330, 336-7):

> "Thus Section 2, Ninth, provided machinery strengthening the representation provisions of the Act. H. Rep. No. 1944, 75d Cong., 2d Sess., p. 2. *That*

new provision gave the National Mediation Board an adjudicatory function in the settlement of representation disputes.

"It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts. As we have already pointed out, Congress left the present problems far back in the penumbra of those new principles which it codified. Moreover, it selected different machinery for their solution. Congress did not leave the problem of intermunion disputes untouched. It is clear from the legislative history of Section 2, Ninth, that it was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or *between groups of employees*." H. Rep. No. 1065, 73d Cong., 2d Sess., p. 3. *However wide may be the range of jurisdictional disputes* embraced within Section 2, Ninth, Congress did *not select the courts to resolve them*. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board. If the present dispute falls within Section 2, Ninth, the administrative remedy is exclusive. If a narrower view of Section 2, Ninth, is taken, it is difficult to believe that Congress saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others. Rather the conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else it left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife." [Emphasis added.]

The Supreme Court's rulings have been recently followed in *Flight Engineers International Ass'n* v. *Eastern Airlines*, 311 F. 2d 745 (2d Cir. 1963); *Airline Stewards and Stewardesses Ass'n Int'l* v. *National Mediation Board*, 294 F. 2d 910 (D. C. Cir. 1961), *cert. denied*, 369 U. S. 810 (1962); *UNA Chapter, Flight Engineers Int'l Ass'n* v. *National Mediation Board*, 294 F. 2d 905 (D. C. Cir. 1961), *cert. denied*, 368 U. S. 956 (1962).

In *W. E. S. Chapter, Flight Engineers Int'l Ass'n* v. *National Mediation Board*, 294 F. 2d 905 (D. C. Cir.), *cert. denied*, 368 U. S. 958 (1962), the court considered almost precisely the same situation as is the subject of the instant Petition. There the court concluded that it was not within the jurisdiction of the judiciary to re-examine charges of interference which had been disposed of by the Board prior to the holding of a representation election and certification. The differences in the *W. E. S.* case and the instant case are marginal and, if anything, argue even more strongly for the correctness of the courts' decision in the instant case. Here, too, the National Mediation Board has issued a certification which is now being challenged by the disappointed union. The only difference is that the instant action was commenced prior to the time that the Board had completed its investigation and certification. As the Court of Appeals below pointed out, the petitioner's case is scarcely advanced by the argument that it should be in a better position to interfere with the Board's procedures, and thus prolong the period of labor instability and chaos, than it would be to review the administrative determination and certification once it has been issued. [App. p. 11a and cases cited]. Moreover, the Board's investigation in this case "was not only as good but better under the circum-

stances" than that in the *W. E. S.* case. [App. p. 15a]. Because of the petitioner's repeated interference with the statutory procedures for the resolution of representation disputes and by its actions against the National Mediation Board in the courts of the District of Columbia, the petitioner, careless of the public interest and the manifest desires of the pilots themselves, brought the nation's second largest airline to the verge of a shutdown. Such tactics and the results they must inevitably produce are in direct contravention of the basic purposes of the Railway Labor Act which is to insure uninterrupted commerce through the prompt and orderly settlement of disputes. See 45 U. S. C. 151(a). The following observations made in connection with the National Labor Relations Act would be at least as applicable to the nation's vital transportation industry:

> "The ability of employers to block elections has been productive of a large measure of industrial strife. When an employee organization has built its membership to a point where it is entitled to be recognized as the representative of the employees for collective bargaining purposes and the employer refuses to accord such recognition, the union, unless an election can be promptly held to determine the choice of representation, runs the risk of impairment of strength by attrition and delay *while the case is dragging on through the courts, or else is forced to call a strike* to achieve recognition by its own economic power. Such strikes have been called when election orders by the National Labor Relations Board have been held up by court review." H. Rep. No. 972, 74th Cong., 1st Sess., pp. 5-6; 2 Leg. Hist. of NLRA (1935) pp. 2960-61. [Emphasis added.]

The decision in *Division No. 14, O. R. T. v. Leighty*, 298 F. 2d 17 (4th Cir.), *cert. denied*, 369 U. S. 885 (1962), involved a controversy between a "local" of the international union and the international itself concerning the representation of employees covered by the Railway Labor Act. There, too, the court held that the resolution of such a controversy was within the exclusive jurisdiction of the National Mediation Board, "although here two separate unions are not involved" and proceedings were pending under the internal machinery of the international union.

The ultimate thrust of all these decisions is that there can only be one agency or one body which can make the final decision concerning the true representative of employees under the Railway Labor Act. The demands for a prompt decision are too insistent and the penalties of delay are too horrendous for the public to bear. Consequently, there must be one agency which can act promptly, effectively and finally to insure employees of a free choice of representative and to certify the results of that choice. The petitioner would invite disaster by allowing the courts to interfere with and delay this procedure, and they would invite chaos by permitting the courts to issue decisions and enter orders which might conflict with the choice of the employees and the certification of the Board.

Remedies are Available for All Violations of the Railway Labor Act.

The petitioner argues that this Court must grant certiorari because *if* there had been a violation of the Railway Labor Act there would be no remedy available to it. Yet, it is manifest that the courts and Board have found no vio-

lations of the Railway Labor Act have been committed. We can only meet, therefore, the petitioner's arguments on the hypothetical basis upon which they are presented.

As we have already seen, the Board will, and has in this case, taken jurisdiction to determine whether there have been any violations of the Act which will interfere with the free conduct of an election. Here it determined that there has been none. Therefore, this type of violation is, presumably, not the type about which ALPA complains.

Injunction to Enforce Certification

To spin the petitioner's hypothetical contentions to a finer point, let us suppose that there may be violations which will *not* affect the employees in their free *choice* of representative but which still warrant remedy. One category of such violations would involve the employer's defiance of the Board's certification where no question of representation exists. Here the court in *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515 (1937), has held that the court may by injunctive relief enforce the Board's certification. The difference between the *Virginian Railway* case and the *M-T-K Railway* case, *supra*, pp. 28-29, is that in the latter (as here) a question of representation existed, and that question can only be resolved by the employees themselves under the procedures of the Railway Labor Act, as supervised by the National Mediation Board. However, when no question of representation exists, as in the *Virginian Railway* case where the carrier refused to deal with the certified union directly after it was certified [see decision of District Court in *Virginian Ry. Co.* v. *System Federation No. 40*, 11 F. Supp. 624, 627 (E. D. Va.

1935)], the courts may remedy the violation since there is no risk of conflict with the decisions of the Board or with the real wishes of the employees.

Criminal Penalties Under the Railway Labor Act

There might be still another category of offense which the petitioner could argue should be remedied. This would be the case that did not involve a question of representation as here, did not involve the enforcement of the Board's certification as in the *Virginian Railway* case, but nonetheless involved some violation of the employees' rights under the Railway Labor Act. Under the National Labor Relations Act there is a scheme for the enforcement of such rights. For instance, if an employee is discharged for union activities, even on behalf of a minority union, an employer may be found guilty of an unfair labor practice and ordered to reinstate the employee with back pay. This type of remedial provision is not contained in the Railway Labor Act. Instead, the Railway Labor Act provides criminal penalties. Under Section 2, Tenth, of the Act, a violation of the very provisions upon which ALPA relies may result in fines of up to $20,000 and imprisonment for up to six months *for each day* of the offense.

In *Airline Stewards and Stewardesses Ass'n Int'l* v. *National Mediation Board*, 294 F. 2d 910 (D. C. Cir. 1961) cert. denied, 369 U. S. 810 (1962), the plaintiff Stewardess Union sought to set aside an NMB representation determination upon the grounds that the carriers had "coerced the stewards and stewardesses into voting for ALPA." The conclusion of the Court of Appeals for the District of Columbia seems equally applicable to the instant case:

"The allegations seem purely conclusory . . . . This sort of claim does not create jurisdiction in the District Court to set aside the Board's determination. See 2 Moore, Federal Practice para. 12.08, at 2244-45 (2d ed. 1960). If appellant's charge of coercion has any substance, appellant can apply for the institution of a criminal prosecution. See Railway Labor Act, Section 2, Tenth, 45 U. S. C. §152."

Remedies Through the N. M. B.

Other procedures were open to ALPA under the Railway Labor Act. Section 5, First (b) of the Act gives the National Mediation Board jurisdiction over "Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused." At no time did ALPA even attempt to file a formal complaint or request for investigation with the National Mediation Board under this provision of the Act although the Board Chairman and staff mediators were supervising the very negotiations about which ALPA now complains. See *IAM* v. *Northwest Airlines*, 304 F. 2d 206, 212 (8th Cir. 1962).

During the course of one of the negotiations supervised by Chairman Edwards, Mr. McMurray, an employee of ALPA from Chicago, interrupted the negotiations and demanded that they stop. Mr. Edwards' reply was "he was there in case someone wanted to make a motion he would listen to it." It is clear that ALPA did not pursue this suggestion further [Tr. 1332-33].

Remedy Through Representation Proceeding

ALPA complains that only the "assisted" union would be in a position to invoke the Board's representation procedures and seek a Board determination of alleged "influence" incident to such a proceeding. The Board's practice does not support such an assertion. The Board's regulations require only a 35% showing of support before another union, other than the petitioner, may receive a place on the ballot. 29 C. F. R. §1206(b). At no time after the Allied petition did ALPA make any representation or showing as to the number or per cent of pilots supporting it. In light of the fact that close to 85% had signed cards supporting Allied; it would have been a mathematical impossibility for ALPA to achieve the 35% indicated by the Board regulations.

The Board, however, has an unwritten policy that the incumbent union, regardless of whether it was certified or merely recognized by the company, automatically appears on the ballot. It may well be that such an incumbent also has an automatic right to obtain a clarification of its position, including an investigation and a Board election held under "laboratory conditions" merely on its own petition.

Federal Aviation Act Remedy

Another forum open to ALPA, if it so chose, is the Civil Aeronautics Board. Under Section 401 (k) (4) of the Federal Aviation Act, 49 U. S. C. §1371(k)(4) the C. A. B. has a separate responsibility to insure compliance with the Railway Labor Act and has at its disposal penalties including the revocation of the carrier's certificate. Only recently, the Board considered a complaint by a union charging

improper interference by the carrier with employees' rights under the Railway Labor Act. *Flight Engineers Int'l Ass'n, EAL Chapter v. Eastern Airlines, Inc.*, Docket 14009, Order No. E-19923 (adopted August 19, 1963), CCH Avi. L. Rep ¶21,399. The CAB held that it was within the exclusive jurisdiction of the NMB to determine *disputes* as to representation.

Remedies are Available but Must Not Conflict

The remedies for wrong under all circumstances are available; the design of the Federal law is such that those who break it will not escape freely. However, ALPA has sought to alter that design for its own purpose and to suit its own taste in order to obstruct and delay the realization of the representation rights of a group of men whom it knew would surely reject it.

The interest of the public in the prompt, certain and final disposition of representation disputes and the interest of the employees in the free expression of their choice and the prompt selection of effective representation surely must prevail.

The Authorities Cited by the Petitioner are Inapposite.

The petitioner cites strings of cases arising under the National Labor Relations Act and urges their applicability to the instant case. We do not intend to examine these cases in detail since they are inapplicable on three grounds:

(1) The decisions under the National Labor Relations Act cannot be transferred as a body to controversies aris-

ing under the Railway Labor Act. The Court of Appeals discussed the differences between the Acts at length. In part, it said [App. p. 16a]:

> "The claim that the courts should do under the Railway Labor Act what Congress directed the NLRB to do under the National Labor Relations Act not only flies in the face of the difference in the language and scheme of the two statutes but ignores the diverse problems to which they were addressed. The Railway Labor Act constituted 'legislation agreed upon between the railroads and the Brotherhoods and probably unique in having been frankly accepted as such by the President and Congress.' '* * * [E]very stage in the evolution of this railroad labor code was progressively infused with the purpose of securing self-adjustment between the effectively organized railroads and the equally effective railroad unions * * *.' *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, 752-53 (1945) (dissenting opinion of Mr. Justice Frankfurter)."

As this Court pointed out in *Brotherhood of R. R. Trainmen v. Chicago River and Ind. R. Co.*, 353 U. S. 30, 31 f. n. 2, 77 S. Ct. 635, 636 (1957):

> "The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act, 49 Stat. 449, as amended, 29 U. S. C. §151 et seq., 29 U. S. C. A., §151 et seq."

In *California v. Taylor*, 353 U. S. 553, 565 (1957), this Court observed:

> "Congress has not only carved this singular industry out of the Labor Management Relations Act of 1947,

61 Stat. 156, 29 U. S. C. 182, 29 U. S. C. A. 182, but it has provided, by the Railway Labor Act, techniques peculiar to that industry. An extended period of congressional experimentation in the field of railway labor legislation resulted in the Railway Labor Act and produced its machinery for conciliation, mediation, arbitration and adjustments of disputes."

(2) Even under the National Labor Relations Act the decisions would not warrant a different result than that reached by the courts below and the National Mediation Board.

(a) There are a number of decisions applying the National Labor Relations Act which hold that an employer may recognize one of two competing unions in the face of conflicting representation claims where there is convincing evidence of the majority position of one of the unions. *E.g., Holyoke Cinema Shops, Inc.*, 139 N. L. R. B. No. 106 (1962); *Cleaver-Brooks Mfg. Corp.* v. *N. L. R. B.*, 264 F. 2d 637 (7th Cir.), *cert. denied*, 361 U. S. 817 (1954); *N. L. R. B.* v. *Indianapolis Newspapers, Inc.*, 210 F. 2d 501 (7th Cir. 1954). This has been the rule in the courts even in the face of a pending Board election proceeding initiated by the minority union where (under N. L. R. B. rules)* some 30% of the employees have presumably indicated their support of the minority union. *N. L. R. B.* v. *Swift & Co.*, 294 F. 2d 285 (3rd Cir. 1961); *N. L. R. B.* v. *Standard Steel Spring Co.*, 180 F. 2d 942 (6th Cir. 1950). In the instant case there is not one jot of evidence or proof that the petitioner enjoyed any substantial support from the American pilots.

* National Labor Relations Board, Statement of Procedure §101.18.

We cannot resist pointing out that the petitioner displays a peculiar brand of presumption in arguing that a wrong was committed because of Allied's recognition during the pendency of the election proceeding. While first claiming that the National Mediation Board was the only forum to resolve the representation dispute, ALPA did everything within its power to throttle the proceeding when Allied took the petitioner at its word and filed a petition. Thus, from one side of its mouth ALPA has argued that the National Mediation Board proceeding should be indefinitely delayed (and undertakes litigation in the District of Columbia to enjoin a Board election), while from the other side of its mouth it argues that the same National Mediation Board proceedings cannot be anticipated by contractual recognition. ALPA's contentions boil down to the argument that the law should be that ALPA may have its cake and eat it too—elections should be indefinitely postponed, but since they are pending, there may be no contractual recognition of the majority representative. The seeming disingenuousness with which ALPA offers these contradictory arguments puts one in mind of the folk tale which is supposed to illustrate the height of presumptuous gall—it tells the story of the juvenile who has strangled his mother, poisoned his father, and now proceeds to sue the State for orphan's insurance.

(b) The petitioner also makes a bootstrap argument to the effect that the Board, and perhaps the employer, acted improperly by proceeding with the determination of the representation question while ALPA's charges were pending. In other words, petitioner would seem to argue that since it filed its charges, which both the courts and the Board found were without merit, all action with respect to

the determination of a representative had to come to a standstill. Such a theory would not vest the power over representation proceedings either in the Board or in the courts but in the hands of any disgruntled, dissatisfied, out cast union group which sought to forestall an election and disrupt industrial peace. In point of fact, the company did not extend recognition to Allied until after the Board had determined that ALPA's charges did not reveal any impediment to a free election. It was then, after ALPA had indefinitely enjoined the Board election, that American granted Allied recognition on the basis of a showing of between 84% and 90% support, which had already been verified by the National Mediation Board (to the extent of 84%). As the courts below found, during the relevant periods prior to contractual recognition, American simply continued dealing with the same Negotiating Committee with which it had been bargaining—the only group which, as a practical matter, presented itself for negotiation and a group which had the highest credentials of majority support. [App. pp. 51a-54a.] Indeed, ALPA's own petition (p. 35) suggests that the Negotiating Committee as directed by the Master Executive Council continued to function within ALPA although at variance with some of its specific policies until well into March, 1963.*

In all events, the Court of Appeals properly pointed out that the practice sometimes employed by the National Labor Relations Board in deferring an election in the face of a pending unfair labor practice charge is only applicable

* The fact that the bargaining committee as late as March 29, 1963 sought a contract in ALPA's name and with ALPA's participation [App. p. 68a] is still further evidence of the pilots' and American's good faith and sincere efforts to avoid a final breach.

where the Board determines that the allegations have *prima facie* merit. See *Surprenant Mfg. Co.* v. *Alpert*, 318 F. 2d 396 (1st Cir. 1963). Most recently, the court in *Typographic Union* v. *McCulloch*, 54 LRRM 2276 (D. D. C. October 3, 1963) (not officially reported), held that it would not enjoin a National Labor Relations Board decertification election on the grounds that the union was precluded from introducing evidence of an unfair labor practice at the representation hearing. In reaching its determination, the court said:

> "If the Union has evidence of employer domination, it may initiate an unfair labor practice case by alleging a violation of Section 8(a)(2) of the Act. If the allegation appears substantial, the General Counsel may issue a complaint and prosecute before a Trial Examiner. The Union, however, has not sustained this *preliminary* burden." [Emphasis added.]

In *Stewart-Warner Corp.* v. *N. L. R. B.*, 194 F. 2d 207 (4th Cir. 1952), the court upheld the right of the employer to recognize a union which had presented convincing proof of its majority status, even though the Board itself had withheld certification because of the unfair labor practice charges filed by a competing union.

We mention these cases merely to show that under similar circumstances, even the application of the law under the National Labor Relations Act would not vary the result in this case. That is, where one union has presented overwhelming evidence of its majority status, while a competing union has made allegations of illegal activity which have been determined to be without even *prima facie* merit, the administrative agency is free to go forward with an

election, and the employer is free to extend contractual recognition.

(3) One of the cases upon which petitioner relies most heavily is *Garment Workers* v. *N. L. R. B.*, 366 U. S. 731 (1961). (See Petition pp. 27, 53, 55, 58, 62, 63, 71). However, an examination of the *actual facts* of that case as related to the facts in the instant case plainly indicates that the *Garment Workers* case is substantial authority for denying ALPA's petition.

In the *Garment Workers* case, the I. L. G. W. U. began an organizing campaign at the company plant. During the course of the campaign, the union and the company entered into negotiations which resulted in the signing of an agreement which recognized the union as the exclusive bargaining representative. Recognition was extended to the union on the basis of signed authorization cards which the National Labor Relations Board later found did not represent a majority of the employees in the appropriate bargaining unit. The company made no effort to check the authorization cards against the employee roll, and the Board found that the union had, in fact, authority to represent only 70 employees out of a total of 280, or 158 out of a total of 368, depending upon the criteria used in determining employee eligibility.

The Board found that this recognition of a *minority* union as the exclusive representative was a violation of the National Labor Relations Act, and this was confirmed by the Court of Appeals. The Supreme Court affirmed, stressing the fact that the company by granting exclusive bargaining status "to an agency selected by a minority of its employees, thereby [impressed] that agent upon the non-consenting majority."

While condemning the employer's recognition of a minority union, this Court (366 U. S. at 739) indicated that there was no reason why an employer could not extend recognition to a union which in fact represented the majority of its employees. In so holding, the Court said:

> "If an employer takes reasonable steps to verify union claims, themselves advanced only after careful estimate—precisely what Bernhard-Altmann and petitioner failed to do here—he can readily ascertain their validity and obviate a Board election."

At the time American Airlines extended recognition to Allied, the union's proof of majority status consisted of authorization cards from *at least* 84% of the employees affected, which had been *verified* by the National Mediation Board for authenticity. Prior to the time of recognition, American did no more than to continue negotiating with the same representatives it had been dealing with over the past year and a half. These representatives were the only group who had been elected by the pilots of American Airlines. The carrier had been advised by the Chairman of the National Mediation Board that there was no alternative available to dealing with these pilot leaders; and the International union, while complaining of the positions taken by the American pilots, offered no feasible alternative to continuing negotiations with this group. [App. pp. 51a-55a, 70a]. Indeed, the status of Allied as the majority representative and the earlier position of the Negotiating Committee as the only duly designated bargaining representative of the pilot group placed *an obligation* upon American Airlines to bargain collectively since it could have no legitimate doubt as to the position of the Negotiating Committee or of Allied.

Each of the cases cited by the petitioner lends itself to this same type of analysis; upon examination of the crucial *facts*, they will be seen to support the course of action taken by American and its pilots.

The Norris-LaGuardia Act Bars Petitioner's Action.

In the courts below we have argued the applicability of the Norris-LaGuardia Act as a bar to the petitioner's suit. The Court of Appeals specifically stated that in view of its disposition of the case it was unnecessary for it to consider our contentions under the Norris-LaGuardia Act. [App. p. 18a]. However, we respectfully submit that that Act deprives the Federal courts of jurisdiction to grant the relief sought and, consequently, would provide an alternative ground to sustain the decision of the courts below and is a further reason why certiorari should be denied.

There can be no question that the gravamen of ALPA's action is the designation by the Federal courts of a bargaining representative. There is no question that such an order would come squarely within the terms of Section 4(b) of the Act, which deprives the Federal courts of jurisdiction to enjoin any employee or group of employees from "becoming or remaining a member of any labor organization * * *." Similarly, the controversies between ALPA, Allied and American clearly constitute "labor disputes" as that term is defined by Section 13(c) of the Act.

None of the exceptions to the Norris-LaGuardia Act can possibly be applicable here. Far from being a situation in which the petitioner can claim its right to enforce the "clear mandate" of the Act [*Virginian Railway Co.* v. *System Federation No. 40, supra*, p. 33], we have here

a situation in which there was, at the very least a question of representation and in which the courts have in fact found the petitioner's claims of support to be unsubstantiated. In an ordinary case the burden on the petitioner to establish facts which would warrant an exception to the Norris-LaGuardia Act is an extraordinarily heavy one. *Chicago R. I. & Pac. R. R. Co. v. Switchmen's Union*, 292 F. 2d 61 (2d Cir. 1961). Here, where petitioner would have to construct a factual case out of whole cloth and in contradiction to the findings of two courts and the National Mediation Board, we submit that its burden would be an impossible one.

POINT III

The decisions of the courts below are consistent with all authority construing the Railway Labor Act.

ALPA has devoted a good part of its Petition to litigation which is not even before this Court and to which neither American nor American's pilots are parties. We have reference to an ultimately unsuccessful action commenced by ALPA in the Federal courts of the District of Columbia to enjoin the National Mediation Board from conducting an election or certifying a representative under the Railway Labor Act. The only purpose for petitioner's extended discussion of this other litigation is apparently to *create* confusion which petitioner can *then* present as a "grievous" problem suitable for this Court's attention. A brief analysis of that litigation and the position of the courts in the District of Columbia will demonstrate that there is no confusion, no basis for suggesting that cer-

tiorari be granted in this case in order to resolve questions which ALPA itself has raised in that other litigation and no reason why the petitioner's "straw-man" should not be laid quietly to rest.

ALPA relied extensively upon its litigation with the National Mediation Board in arguing its case to the courts below. See, *e.g.*, ALPA Reply Brief to Court of Appeals for the Second Circuit, pp. 31-42; transcript of oral argument to the Court of Appeals for the Second Circuit, pp. 14 15, 26. In this Court, the petitioner states that it is not questioning the actions of the National Mediation Board (p. 29), but then predicates its argument in support of its Petition upon the proceedings in the District of Columbia. See, *e.g.*, pp. 5-13, 31.

The action in the District of Columbia against the National Mediation Board was commenced only a few days before the Board was scheduled to send out election ballots and some two months after Allied's representation petition had been filed. ALPA's first move was to obtain an *ex parte* restraining order against the Board. ALPA has previously taken umbrage at the characterization of the order as "*ex parte*". (Reply Brief to the Court of Appeals, p. 32.) The indisputable fact is, however, that although the Board may have received telephonic notice of an argument on ALPA's motion, it did not receive the full notice required by the Federal rules for such motions and did not have an opportunity to adequately prepare answering papers. The initial proceedings for injunctive relief were based primarily upon the same papers which had been filed by ALPA in the District Court in New York. They were voluminous. They contained charges and alle-

gations of outrageous violations of the Railway Labor Act. They nowhere disclosed the true relationship of the parties involved in the New York action or the true state of facts as finally found by the Federal courts in New York. Indicative of the approach adopted by ALPA was its submission of a lengthy document which it entitled "Statement of Undisputed Facts" in the New York action; of course, the "facts" contained in that document had been hotly disputed and refuted point by point by both American and the pilots. But the District Court in Washington did not know this.

ALPA's tactics in the District of Columbia indicate the reason why its action against the NMB was commenced in that forum rather than in the Federal courts in New York. There was no jurisdictional obstacle to an action against the National Mediation Board in New York. Although Judge Wyatt, the presiding judge in the New York action, indicated that he might soon leave the country on vacation, Chief Judge Ryan assured all the parties in his chambers that he would be available if any further action had to be taken in connection with the pending litigation. Of course, in New York the court would have had available to it the *full* record of more than 3,100 pages of transcript and hundreds of exhibits; of course, if the action had been brought in New York, the fledgling Allied Pilots Association would have been able to afford the expense of intervention and participation in the action. By bringing the action in the District of Columbia, ALPA avoided these embarrassments.

The restraint against the National Mediation Board was from time to time extended by the Federal District Court

in the District of Columbia. Relatively early in that litigation, one of the district judges indicated that calendar conditions were such that a full hearing could not be held on a preliminary injunction for a matter of months and that a restraining order would be extended until such a hearing, despite the 20-day limitation in the Federal Rules. It was after this fact became known to Allied that it insisted upon receiving recognition from the company on the basis of the 84% to 90% of the authorization cards in its possession. Subsequently, on July 12, 1963 the Court of Appeals for the District of Columbia ordered the restraining order vacated because its repeated extension without adequate findings of fact and conclusion of law constituted an improper preliminary injunction.

A few days after the Court of Appeals for the District of Columbia remanded the case to the District Court, and without any evidentiary hearing or testimony, which ALPA apparently believes so necessary in other circumstances, the District Court for the District of Columbia issued a preliminary injunction against further Board proceedings until there had been a decision by the District Court in New York [App. p. 91a]. After the adverse decision by the District Court in New York, ALPA applied for an expedited appeal in the Second Circuit, which it received, and after various proceedings in the District of Columbia obtained a further restraint against the Board from the Court of Appeals on August 22, 1963 "in view of the pendency of the appeal [in] * * * the Second Circuit." Appendix B to American's Brief.

After the decision of the Second Circuit, the National Mediation Board moved to vacate the injunction against it. This was resisted by ALPA on the grounds that it in-

tended to file this Petition for certiorari and on the further grounds that it had an appeal pending before the Court of Appeals for the District of Columbia by which it sought to require a further hearing or additional proceedings by the National Mediation Board prior to an election. Notwithstanding these arguments, the Court of Appeals for the District of Columbia, on October 23, 1963, dissolved the injunction against further Board proceedings.

The National Mediation Board then moved directly to conduct an election and mailed ballots to American's pilots which were to be returned and counted by November 7, 1963. There could be no mistake of the Board's intentions with respect to carrying out its statutory duties, and ALPA moved once more before the Court of Appeals for the District of Columbia, this time to enjoin the tabulation of the ballots. The Court of Appeals denied ALPA's motion and permitted the NMB to go forward with the tabulation and certification (Appendix B p. 56). The ballots were tabulated, giving Allied some 92% of the votes, and on November 13, 1963, Allied was certified as the bargaining representative of American's pilots [Appendix A to American's Brief]. Thus, there can be no question that the Court of Appeals for the District of Columbia has recognized the right of the National Mediation Board to go forward with its duty under the Railway Labor Act to determine and certify the representative of American's pilots.

After a tortuous eight months, Allied's petition has been acted upon and Allied has been certified. The Federal Courts in the Second Circuit, the Court of Appeals for the District of Columbia, and the Board itself all determined that there was no basis in law or fact to prevent the Board from exercising its responsibility in determining

questions of representation. There can be no further question now that the Board's certification is final and dispositive. *Switchmen's Union* v. *N. M. B.*, 320 U. S. 297 (1943); *Radio Officers Union* v. *N. M. B.*, 181 F. 2d 801 (D. C. Cir. 1950); *Decker* v. *Venezolana*, 258 F. 2d 153 (D. C. Cir. 1958).

The record plainly shows that the National Mediation Board was more than fair to the position of ALPA and extended an investigation and scrutiny of ALPA's charges which those charges did not in fact deserve. It did not act in any way contrary to the early decision in *Order of Railway Conductors* v. *N. M. B.*, 141 F. 2d 366 (D. C. Cir. 1944), upon which ALPA relies so heavily. In the instant case, the Board did conduct an investigation of ALPA's charges, even before docketing the matter as a representation proceeding; the only criticism that may be made of the Board is that it expended a full month investigating and finally rejecting those charges, whereas Section 2, Ninth, of the Railway Labor Act directs that the investigation *and* certification be consummated within 30 days after the petition.

The petitioner is dissatisfied with the Board's investigation; the petitioner is dissatisfied with the judgments of the courts below; the petitioner is distraught with the fact that 92% of American's pilots have chosen another union which has been certified as their representative. On these grounds, it would have the courts substitute their judgment for that of the National Mediation Board and the employees involved. There is no basis for such a course either in law or in the policies of the Railway Labor Act, which is designed to insure uninterrupted commerce, stable labor relations, the prompt disposition of inflammable disputes and the right of employees to select representatives of their own choosing.

Conclusion

For the foregoing reasons, we respectfully submit that the petition for certiorari be denied.

Respectfully submitted,

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